STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2011
v	No. 297269 Oakland Circuit Court
BRADLEY ALLEN SENTEK, Defendant-Appellant.	LC No. 2007-218040-FH

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant pleaded guilty to use of the Internet to communicate with another to commit a crime (child sexually abusive activity), MCL 750.145d(1)(a) and d(2)(f); MCL 750.145c(2). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to 12 months to 30 years in prison, and required defendant to register as a sex offender under the Sex Offender Registration Act ("SORA"), MCL 28.721 *et seq*. Defendant appeals by delayed leave granted. We affirm.

Defendant used a computer to communicate with an undercover officer posing as a 14-year-old boy. The conversation pertained to sexual acts. Defendant also appeared for a meeting, believing he would be meeting with a 14-year-old boy.

Defendant argues that he should not be required to register under the SORA because the "victim" of his crime was not actually a minor. "The construction and application of SORA presents a question of law that we review de novo." *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007), citing *People v Meyers*, 250 Mich App 637, 643; 649 NW2d 123 (2002).

MCL 28.723(1)(a) requires all individuals convicted of a "listed offense" after October 1, 1995, to register under the SORA. MCL 28.722(e) defines the term "listed offense". Subsection e(i) defines the term to include child sexually abusive activity, MCL 750.145c, whereas subsection e(xiii) defines it to include an attempt or conspiracy to commit certain other listed offenses, including child sexually abusive activity. Defendant points out that he was not convicted of child sexually abusive activity and was not convicted of an attempt or conspiracy to commit child sexually abusive activity. He further points out that using a computer to commit a crime is not specifically included as a "listed offense" in MCL 28.722(e). Defendant argues that his conviction offense would serve as the basis for requiring registration under the SORA only if it qualifies under the following catch-all provision found in MCL 28.722(e)(xi), which states:

> Any other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age.

Preliminarily, in applying the catch-all provision, "the particular facts of a violation, and not just the elements of the violation, are to be considered." *People v Althoff*, 280 Mich App 524, 534; 760 NW2d 764 (2008). This determination can relate to uncharged conduct if supported by a preponderance of the evidence. *Golba*, 273 Mich App at 613-614. *People v Lee*, 288 Mich App 739, 745; 794 NW2d 862 (2010). See also *People v Anderson*, 284 Mich App 11, 12-13; 772 NW2d 792 (2009) (even if the *Golba* Court relied on dictum in *Meyers* for the stated proposition, it agreed with *Meyers*, and the holdings in *Golba* and *Althoff* are binding).

Communication with someone believed to be a minor for the purpose of engaging in sexual acts is, "by its nature", a sexual offense. Cf. *Meyers*, 250 Mich App at 649 ("there is no question that Meyers' online discussion was, 'by its nature,' sexual in that it specifically involved graphic discussions of oral sex, which Meyers hoped to obtain from the person with whom he was conversing over the Internet.") Resolution of this appeal therefore turns on whether the crime was "against an individual who is less than 18 years of age."

In *Meyers*, the defendant was convicted under the same statute as defendant of using the Internet for the purpose of committing a crime, MCL 750.145d. The defendant in *Meyers* was also communicating with an adult posing as a minor. He argued that it was impossible to have used the Internet to attempt to accost a child because the officer involved was not a child. Quoting *People v Thousand*, 465 Mich 149, 165; 631 NW2d 694 (2001), the *Meyers* Court noted that "'the nonexistence of a minor victim does not give rise to a viable defense to the attempt charge in this case,' disposing of factual impossibility and hybrid legal impossibility as valid defenses." *Meyers*, 250 Mich App at 653. Pointing out that the SORA incorporated an attempt provision, the *Meyers* Court held that

> the Legislature did not indicate in MCL 28.722 that any form of the impossibility doctrine [i.e., legal, hybrid legal or factual impossibility] exists as an exception to the registration requirement for individuals who have attempted to commit a listed offense. To the contrary, the structure and all-inclusive language of MCL 28.722(d),[1] especially subsections x through xiii, reveal the Legislature's intent to have as many sex offenders comply with the registration process as possible. Though pure legal impossibility is available as a defense, we would have to ignore SORA's comprehensive registration scheme to conclude that the factual impossibility or hybrid legal impossibility of completing the underlying offense would excuse a defendant convicted of an attempt from registering. . . . . [W]e conclude that these two variations of the impossibility doctrine have no relevance when determining if a defendant convicted of an attempt must register pursuant to SORA. [*Meyers*, 250 Mich App at 654.]

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[1] Paragraph (d) was redesignated as paragraph (e) by 2002 PA 542.

Meyers is arguably distinguishable in that the defendant in that case was convicted of using the Internet to communicate with a person for the purpose of *attempting* to commit the crime of accosting a child. Here, the crime for which defendant was convicted did not cite an attempt. However, for purposes of the SORA's catch-all provision, *Golba*, *Althoff*, and *Lee* indicate that the underlying facts, not the elements of a crime, govern. The underlying facts in this case show that defendant attempted to engage in child sexually abusive activity with a minor. Accordingly, registration under the SORA is required.

Defendant argues that this result should not obtain in light of *People v Russell (On Remand)*, 281 Mich App 610, 615; 760 NW2d 841 (2008). In that case, this Court held that when an undercover officer poses as a minor, Offense Variable 10 cannot be scored for a "vulnerable victim". However, the sentencing guidelines and concomitant scoring of the offense variables are determinative of a defendant's punishment, whereas the SORA is intended as a public safety measure. Quoting *Lanni v Engler*, 994 F Supp 849, 854 (ED Mich, 1998), the *Lee* Court noted:

> "Dissemination of information about a person's criminal involvement has always held the potential for negative repercussions for those involved. However, public notification in and of itself has never been regarded as punishment when done in furtherance of a legitimate government interest . . . The registration and notification requirements can be more closely analogized to quarantine notices when public health is endangered by individuals with infectious diseases . . . . Whenever notification is directed to a risk posed by individuals in the community, those individuals can expect to experience some embarrassment and isolation. Nonetheless, it is generally recognized that the state is well within its rights to issue such warnings and the negative effects are not regarded as punishment." [*Lee*, 288 Mich App at 743 (citation omitted in original).]

Since the purposes of the sentencing guidelines are at odds with the purposes of SORA, the rationale for scoring Offense Variable 10 does not govern a determination relative to the SORA. Rather, SORA's purpose of protecting the public from sex offenders will be furthered by including offenders such as defendant who, but for being foiled, likely would have completed a sexual offense.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering